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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 677

THE CITY OF SEATTLE, ET AL., APPELLANTS

v.

ROBERT R. BEEZER, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MEMORANDUM OF THE FEDERAL POWER COMMISSION AS AMICUS CURIAE

This is an appeal from a decree of mandamus entered by the Supreme Court of the State of Washington on October 7, 1963, directing the Superior Court for King County, Washington, to exercise jurisdiction over a suit to relitigate issues decided by a license order of the Federal Power Commission and affirmed on review by a Federal court of appeals. The Solicitor General, on behalf of the Federal Power Commission, submits this memorandum, *amicus curiae*, in support of appellants.

OPINION BELOW

The opinion of the Supreme Court of Washington, issued on July 18, 1963, is reported at 162 Wash.

Dec. 559, 383 P. 2d 895, and reproduced in Appendix A to appellants' Jurisdictional Statement. Related earlier opinions of the Supreme Court of Washington are reported at 60 Wash. 2d 239, 373 P. 2d 796 (July 12, 1962) and 60 Wash. 2d 652, 375 P. 2d 256 (October 2, 1962). These two opinions appear as Appendices C and D, respectively, to the Jurisdictional Statement. The opinions of the Federal Power Commission and its examiner are reported as *City of Seattle* at 26 FPC 54, 61, 463, and the opinion of the Court of Appeals is reported as *Public Utility District No. 1 of Pend Oreille County* v. *Federal Power Commission,* 308 F. 2d 318 (C.A.D.C.)[1]

JURISDICTION

The mandamus proceeding below was initiated before the Supreme Court of the State of Washington pursuant to Article IV, Section 4 of the Washington Constitution and two State statutes (Revised Code of Washington 2.04.010 and Revised Code of Washington 7.16.160) as a means of determining the jurisdiction of the Washington trial court. The decree issuing the peremptory writ of mandamus was entered on October 7, 1963, simultaneously with the order denying rehearing. Appellants filed the notice of appeal in this case in the Supreme Court of the State of Washington on November 4, 1963.

Cases supporting the conclusion that the judgment of the State Supreme Court is final are discussed at pp. 10–13, *infra.* Although jurisdiction on

[1] Certiorari denied, 372 U.S. 908, rehearing denied, 372 U.S. 956, motion for leave to file second petition for rehearing denied, 375 U.S. 871.

appeal may be doubtful, this Court may treat the papers as a petition for a writ of certiorari. 28 U.S.C. 2103.

QUESTION PRESENTED

The Federal Power Commission issued a hydroelectric project license to the City of Seattle in preference to a rival applicant, Public Utility District No. 1 of Pend Oreille County (PUD). PUD had argued before the Commission that a State statute (Revised Code of Washington 35.84.030) prohibits condemnation by Seattle of lands owned by PUD which are essential for the exercise of the Federal license. In sustaining Seattle's claim, the Commission held, at the threshhold, that Section 21 of the Federal Power Act grants the power of eminent domain to a licensee and cures whatever incapacity there might otherwise be under State law. PUD appealed to the United States Court of Appeals for the District of Columbia Circuit which affirmed, also holding that Seattle has power of eminent domain power under the Federal Act. This Court denied certiorari. The following question is presented:

Whether, in a suit brought by a taxpayer of Seattle and supported by PUD, the Washington courts may now reexamine the holdings of the Federal Power Commission and of the United States Court of Appeals that Seattle has a power of condemnation conferred by federal law which is not subject to any limitations on condemnation imposed by State law.

STATUTES INVOLVED

The relevant State and federal statutes are set forth in the Appendix, *infra* pp. 17–18.

STATEMENT OF THE CASE

This is the latest episode in litigation beginning in 1953 and involving several separate legal and administrative proceedings arising out of the plan of the City of Seattle to construct a power project on the Pend Oreille River. The first proceeding, recently concluded by this Court's denial of certiorari, involved the competing and mutually exclusive applications of the City of Seattle and of Public Utility District No. 1 of Pend Oreille County, Washington (PUD), for Federal Power Commission licenses. The Commission awarded a license to Seattle and, on appeal by PUD, the United States Court of Appeals for the District of Columbia Circuit affirmed.

A second proceeding involves Seattle's pending suit to condemn certain lands owned by PUD, initiated in the United States District Court for the Eastern District of Washington pursuant to Section 21 of the Federal Power Act.

The present case arises out of two actions in the State courts by a taxpayer of Seattle, supported by PUD, to block Seattle's exercise of its federal license on the ground that Seattle may not condemn PUD's lands—a matter resolved in Seattle's favor in the first proceeding.

The hydroelectric project.—The Pend Oreille River is a navigable water of the United States, tributary to the Columbia River. The hydroelectric project which the Commission licensed as best adapted to the comprehensive development of this water will have an initial capacity of 840,000 horsepower and provision for an ultimate capacity of 1,260,000 horse-

power. 26 FPC at 142.[2] In terms of ultimate capacity, the project (No. 2144) is the fifth largest ever licensed by the Commission. Federal Power Commission, Forty-second Annual Report, pp. 135–140. The licensee, City of Seattle, is a municipal corporation in the State of Washington which commenced electric utility operations in 1905 and has become the second largest municipal utility in the United States. 26 FPC at 93. Seattle's unsucessful rival for the license, PUD, is also a municipal corporation in the State of Washington. PUD owns shorelands of the Pend Oreille River which must be flooded as a result of constructing Seattle's project.

The prior license proceedings.—Seattle applied to the Federal Power Commission for a preliminary permit and, later, for a license. PUD was permitted to intervene. It urged, *inter alia,* that Revised Code of Washington 35.84.030 prohibited the condemnation by Seattle of the property belonging to PUD and essential to the project. After lengthy administrative hearings, the presiding examiner found that the PUD shorelands were indispensable to Seattle's project and that Seattle could not acquire them without resort to condemnation; but he concluded that Seattle would have power under federal law to condemn them, notwithstanding any State prohibition, if it were issued a license. 26 FPC at 65.

[2] As originally issued, the license provided for six initial generating units and three future additions of 90,000 kilowatts each. The license has been slightly revised to provide for four initial and two additional units of 137,750 kilowatts each. 29 FPC 1098.

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On exceptions to the examiner's decision PUD again raised the issue (26 FPC at 55) whether "by reason of the laws of the State of Washington, Seattle is unable to acquire the lands necessary for it to effect the purposes of the license issued to it."

The full Commission affirmed the examiner and, when PUD renewed its contention in applying for rehearing, held (26 FPC at 466):

> * * * We need not decide in this proceeding whether Seattle is prohibited by state law from acquiring the particular properties of PUD in question. In our opinion Seattle's right to acquire these properties by the exercise of the power of eminent domain under Section 21 of the Federal Power Act is well established. * * * And as we found in [our] order issuing license, Seattle has submitted satisfactory evidence of compliance with the requirements of all applicable state laws insofar as necessary to effect the purposes of the license.

PUD sought review in the Court of Appeals pursuant to Section 313(b) of the Federal Power Act. Again, it raised the question whether the limiting provision of RCW 35.84.030 could prevent Seattle from exercising the right of condemnation conferred by Section 21 of the Federal Power Act. The Court of Appeals held that "the State statute here involved, even if according to its own terms it is applicable, cannot make it impossible for Seattle as a federal licensee to condemn under the federal statute." *Public Utility District No. 1 of Pend Oreille County* v. *Federal Power Commission*, 308 F. 2d 318, 323.

PUD petitioned for a writ of certiorari from the decision of the Court of Appeals. This Court denied certiorari (372 U.S. 908), rehearing (372 U.S. 956), and leave to file a second petition for rehearing (375 U.S. 871).

The State court injunction proceedings.—On November 29, 1961—soon after the Commission had issued a license to the City of Seattle—one Beezer, a taxpayer of Seattle, instituted a suit in the Superior Court for the State of Washington for King County for an injunction against expenditure of funds "in connection with the license granted the City of Seattle by the Federal Power Commission and any proposed condemnation proceedings." R. 0007. The complaint recognized that Seattle was acting pursuant to the federal license in making plans to condemn PUD's properties (R. 0005), but urged that the City's plans conflicted with State law. The complaint also noted the pendency of a petition to review the license order in the United States Court of Appeals (R. 0004). PUD promptly filed its own complaint in intervention (R. 0016–0030) in the State court proceeding.

Seattle's answer (filed December 18, 1961; R. 0031–0035), amended answer (filed December 21, 1961; R. 0036–0039), and motion for summary judgment (filed December 22, 1961; R. 0054–0055) pleaded that maintenance of the Beezer-PUD suit constituted an impermissible collateral attack upon the orders of the Federal Power Commission which were currently under review before the federal court. After argument, the State trial court granted Seattle's motion for summary judgment, holding both that the Federal con-

demnation statute superseded the State law and that the Beezer-PUD suit was an impermissible collateral attack upon the Commission's licensing orders. Beezer and PUD appealed to the Supreme Court of Washington, which, on July 12, 1962, set aside the summary judgment of dismissal, holding that the applicability of the Revised Code of Washington 35.84.030 was properly in issue before the Superior Court. 60 Wash. 2d 239, 373 P. 2d 796 (J. S. Appendix C.). Three Justices dissented on the ground that exclusive jurisdiction to revise the Federal Power Commission's determination resided in the federal courts.

The appeal was still pending before the Washington court on a timely petition for rehearing when, on August 30, 1962, the Court of Appeals ruled that Seattle, as a federal licensee, would have power to condemn the shorelands in question irrespective of State law. Accordingly, Seattle moved in the Washington Supreme Court to dismiss the appeal on grounds of mootness and *res judicata*. R. 0074. On October 2, 1962, that court denied the motion. 60 Wash. 2d 652, 375 P. 2d 256 (J.S. Appendix D). The majority reasoned that the judgment of the Court of Appeals was not binding on PUD because certiorari might yet be sought.[3] Three Justices dissented.

On November 20, 1962, the case was remanded. Before the Superior Court proceeded with the trial, this

[3] It appears (R. 0086–0087) that in answer to Seattle's motion to dismiss the appeal Beezer conceded that if this Court denied certiorari, then "admittedly the state court case will be both 'moot' and '*res judicata*', and no inconsistent decision would be possible."

Court denied PUD's petitions for certiorari (372 U.S. 908, February 18, 1963) and rehearing (372 U.S. 956, March 25, 1963). Seattle thereupon moved to dismiss the action in the Superior Court (R. 0085) and, after argument on April 11, 1963, that court indicated that it would dismiss because it was "without any jurisdiction to proceed". R. 0093; Petition for Mandamus, Ex. C. However, the trial judge withheld entry of judgment to permit Beezer to seek an original writ of mandamus from the Washington Supreme Court, a procedure which appears to be more expeditious than appeal from a dismissal.

The present mandamus proceeding.—On April 18, 1963, Beezer (again joined by PUD) filed a petition for writ of mandamus in the Supreme Court of Washington. R. 0078–0099. On July 18, 1963, the State Supreme Court issued its opinion granting the petition. R. 0102–0112, 162 Wash. 559, 383 P. 2d 895 (J. S. Appendix A). It refused to accept the then-concluded federal litigation involving PUD and Seattle as the law of the case because the technical requirements of *res judicata* were not fulfilled. It also declined, in the absence of a decision on the merits by this Court, to accept the Superior Court's alternative ground of decision—that a determination as to the scope and application of State law was pointless because the eminent domain powers of a federal licensee under Section 21 are not limited by State prohibitions against condemnation. It concluded (four Justices dissenting) that the Superior Court had jurisdiction and should proceed to trial on the

question of whether State law prohibited condemnation of PUD's properties by Seattle.

On October 7, 1963, the Washington court denied rehearing, entered judgment, and issued a peremptory writ of mandamus declaring that the Superior Court "has full and complete jurisdiction to proceed with the trial" and ordering it to do so. R. 0115.

THE QUESTIONS ARE SUBSTANTIAL

Under Section 313(b) of the Federal Power Act, as construed by this Court in *City of Tacoma* v. *Taxpayers of Tacoma,* 357 U.S. 320, the exclusive judicial forum with authority to rule upon the federal licensee's capacity to condemn the property of PUD—a question which had previously been decided by the Federal Power Commission—was the United States Court of Appeals on review of the Commission's order. The question was litigated there by PUD; it was decided in Seattle's favor; and the decision—that the eminent domain power granted a licensee by Section 21 of the Federal Power Act may be exercised by Seattle even if the Washington statute prohibits Seattle from condemning PUD's lands—was subject to further review only in this Court. For this reason, the final judgment below, sustaining a State court's jurisdiction to reexamine the merits of this question, should be reversed.

1. The decree below is a final judgment within the meaning of 28 U.S.C. 1257. As in *Local No. 438* v. *Curry,* 371 U.S. 542, 548, the issue ripe for review is neither whether a State court has erroneously decided a matter of federal law in a case admittedly within

its jurisdiction, nor whether it is federal or State law that governs a case properly before the State courts. Under review here, as in *Curry*, is the judgment of a State court "finally and erroneously asserting its jurisdiction to deal with a controversy which is beyond its power and instead is within the exclusive domain" of the federal regulatory agency. 371 U.S. at 548. This issue, in the words of *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558, "is a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action." Indeed, the appealability of the State judgment is clearer in the instant case than in *Mercantile National Bank*, for here, as in *Curry*, the maintenance of the State litigation threatens serious interference with a significant federal program. Comprehensive development of the nation's water resources requires a federally prescribed timetable which cannot be met when State court proceedings prevent the timely issuance of revenue bonds essential to finance the construction (26 FPC at 137, Finding 62).[4]

[4] Section 13 of the Federal Power Act explicitly provides for assuring the diligent construction of licensed projects and requires that the licensee "within the time fixed in the license complete and put into operation such part of the ultimate development as the commission shall deem necessary to supply the reasonable needs of the then available market." The license for this development of the Pend Oreille River requires (26 FPC at 59):

> *Article 28.* The Licensee shall commence construction of the Composite development, Project No. 2144, within one year of the effective date of this license; shall thereafter in good faith and with due diligence prosecute such construc-

To carry the point a step farther, this case calls even more strongly for review than *Curry* since there the preempting federal jurisdiction had not yet been exercised. Here, the federal tribunals, both administrative and judicial, have actually exercised the jurisdiction which Section 313(b) of the Federal Power Act makes exclusive, so that the final action of the courts which do have jurisdiction—as well as the exclusivity of that jurisdiction—calls for vindication.

The foregoing considerations would govern even if the Washington court, acting on an appeal, had reversed the trial court's dismissal for want of jurisdiction. In fact, the Washington court issued a writ of mandamus in a separate suit. This Court's jurisdiction is, therefore, also sustained by the settled rule that a special writ proceeding will ordinarily be regarded as a separate and distinct suit even though the judgment leaves some other controversy undecided. When a proceeding by way of a mandamus or a prohibition proceeding determines the jurisdiction of an inferior tribunal, the final disposition of that proceeding is a final judgment, reviewable by this Court, even if the judgment below is in favor of jurisdiction and orders (or sanctions) further proceedings in the principal suit. *Pacific Coast Dairy* v. *Depart-*

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tion; and shall complete the project and place it in operation within six years from the effective date of this license.

The Commission's timetables may only be extended "when not incompatible with the public interests" (Section 13, 16 U.S.C. 806), yet precisely the sort of litigation which the Washington court here entertains has been the source of serious delays to earlier licensed hydro-electric developments. See *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. at 330–331, 333; *City of Tacoma*, 21 FPC 41.

ment of Agriculture of California, 318 U.S. 285 (reversing the State court on the merits after requesting argument of the finality question, see 63 S. Ct. 55). As this Court has stated, *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.,* 240 U.S. 30, 31:

> * * * Prohibition is a distinct suit and the judgment finally disposing of it is a judgment within the meaning of the Judicial Code, * * * and by the common law. * * * *Weston* v. *Charleston,* 2 Pet. 449, 464, 465. The fact that it does not decide the merits of the principal suit is immaterial. It is not devoted to that point, but only to the preliminary question of the jurisdiction of the court in which that suit is brought.

See, also, *Michigan Central Railroad Co.* v. *Mix,* 278 U.S. 492, 494; *St. Louis, B. & M. Ry. Co.* v. *Taylor,* 266 U.S. 200, 206; *Detroit & Mackinac Ry. Co.* v. *Michigan Railroad Commission,* 240 U.S. 564, 570; *Bandini Petroleum Co.* v. *Superior Court,* 284 U.S. 8, 14; *Pan American Petroleum Corp.* v. *Superior Court,* 366 U.S. 656; *Madruga* v. *Superior Court,* 346 U.S. 556, 557, n. 1.

The law of Washington provides for a separate suit in mandamus to compel a trial court to proceed with a case which it regards as beyond its jurisdiction. *State ex rel. Pryor* v. *Paul,* 5 Wash. 2d 90, 104 P. 2d 745, and cases there cited; *cf.* Feigenbaum, *Interlocutory Appellate Review Via Extraordinary Writ,* 36 Washington L. Rev. 1 (1961). The formal judgment below disposes of the mandamus suit and meets the traditional test of finality.

2. That the State courts have no jurisdiction to pass upon Seattle's powers as a licensee under the

Federal Power Act is established by this Court's holding in *City of Tacoma* v. *Taxpayers of Tacoma,* 357 U.S. 320. There, as here, the Federal Power Commission found it necessary to inquire into the capacity of a Washington municipality to condemn property in order to pass upon objections to its application for a license; there, as here, the Commission and a reviewing Court of Appeals determined that Section 21 of the Federal Power Act grants a power of condemnation that is not subject to limitations imposed by State law on the condemnation powers of a municipality; there, also, this Court denied review of this issue; finally, in that case as in this one, the Washington courts sought to assert jurisdiction over an independent and subsequent suit to determine the municipal licensee's condemnation powers. With the case in that posture, this Court held in *Tacoma* that the exclusive jurisdiction to adjudicate issues determined by a Commission order is vested in the federal Courts of Appeals (and in this Court on certiorari) pursuant to the statutory review provisions of Section 313(b) of the Federal Power Act.

No adequate distinction between the two cases can be bottomed upon the fact that the State of Washington, which was held to represent its citizens (357 U.S. at 340–341), appeared before the Commission and court of appeals in *Tacoma* and chose not to appear in this case. The taxpayer, Beezer, never attempted to become a party to the Commission proceedings pursuant to Section 308(a) of the Act, 16 U.S.C. 825g(a), although he was afforded the statutory

notice required by Section 4(f), 16 U.S.C. 797(f). He cannot now collaterally attack the Commission's final order. For purposes of these proceedings, he accepted the representation of the City of Seattle. He cannot now object that the City adopted a litigating position different from that he would have chosen.

This is especially clear in the present case for even now Beezer asserts no interest which was not fully protected by the presence of the City of Seattle in the Commission proceedings. Beezer does not suggest that the proposed project is contrary to the interests of Seattle or its citizens. His sole claim is that Seattle should be enjoined from expending tax revenues in furtherance of a project which (so he alleges) it cannot complete because, in the face of Revised Code of Washington 35.84.030, it cannot acquire necessary properties from PUD. But the square holding of *City of Tacoma* v. *Taxpayers of Tacoma,* 357 U.S. 320, compels the conclusion that PUD, having failed before the Commission and on review, cannot again challenge the Commission's holding sustaining Seattle's condemnation powers under Section 21 of the Federal Power Act. Because of Seattle's successful defense of its position before the Commission and court of appeals, there can be no further obstacle to its condemnation of the properties it needs. Seattle's presence before the Commission and the federal courts

fully protected its taxpayers, including Beezer, against the harm they claim to apprehend.[8]

CONCLUSION

For the foregoing reasons, review should be granted and the judgment below reversed.

Respectfully submitted.

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RICHARD A. SOLOMON,
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Federal Power Commission.

DECEMBER 1963.

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[8] While we believe that, just as in the *Tacoma* case, 357 U.S. 320, 334, there is no occasion for this Court to review the merits of the issues litigated before the court of appeals, we submit that the court of appeals correctly held that Section 21 of the Federal Power Act confers powers of eminent domain with respect to all properties necessary in the public interest for developing a waterway and without regard to the vagaries of State condemnation law. *Public Utility District* v. *Federal Power Commission*, 308 F. 2d 318 (C.A.D.C.), certiorari denied, 372 U.S. 908; *State of Washington Department of Game* v. *Federal Power Commission*, 207 F. 2d 391 (C.A. 9), certiorari denied, 347 U.S. 936. The guiding principles have, indeed, been established since the decision in *First Iowa Hydro-Electric Coop.* v. *Federal Power Commission*, 328 U.S. 152, 181, where the Court said that the "detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls." (Footnotes omitted.)

APPENDIX

Section 35.84.030 of the Revised Code of Washington provides:

> Every city or town owning its own electric power and light plant may exercise the power of eminent domain as provided by law for the condemnation of private property for any of the corporate uses or purposes of the city or town: *Provided,* That no city or town shall acquire, by purchase or condemnation, any publicly or privately owned electric power and light plant or electric system located in any other city or town except with the approval of a majority of the qualified electors of the city or town in which the property to be acquired is situated; nor shall any city or town acquire by condemnation the electric power and light plant or electric system, or any part thereof, belonging to or owned or operated by any municipal corporation, mutual, nonprofit, or cooperative association or organization or by a public utility district.

Section 21 of the Federal Power Act, 41 Stat. 1074, 16 U.S.C. 814, provides:

> When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the

use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such lands or other property may be located, or in the State courts.

Section 313(b) of the Federal Power Act, 49 Stat. 860, as amended by 72 Stat. 947, 16 U.S.C. 8251(b), provides:

> (b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * * Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. * * * The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

U.S. GOVERNMENT PRINTING OFFICE: 1963